

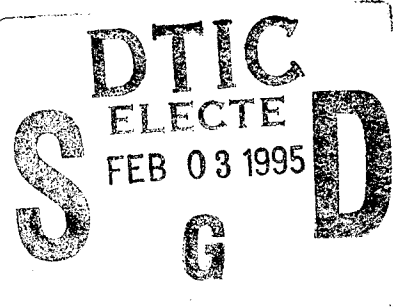
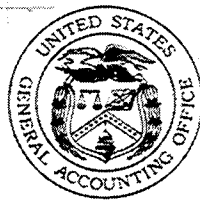
GAO

Report to the Subcommittee on Health and
Safety, Committee on Education and
Labor, House of Representatives

April 1992

OCCUPATIONAL SAFETY AND HEALTH

Penalties for Violations Are Well Below Maximum Allowable Penalties



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April 6, 1992

The Honorable Joseph M. Gaydos
Chairman, Subcommittee on Health and Safety
Committee on Education and Labor
House of Representatives

The Honorable Paul B. Henry
Ranking Minority Member
Subcommittee on Health and Safety
Committee on Education and Labor
House of Representatives

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Civil penalties are an important enforcement tool for the Occupational Safety and Health Administration (OSHA) to encourage employers to meet their responsibilities to provide safe and healthful workplaces. Because of its concern that OSHA's penalty dollar amounts were too low to be effective deterrents, the Congress raised the maximum allowable penalty amounts in November 1990. Before this increase was enacted, you asked us to review the way penalties for workplace safety and health violations are initially proposed and subsequently reduced and, if appropriate, to suggest alternative procedures for assessing penalties. You also asked us to determine (1) how actual penalties have compared with the maximums allowed, (2) whether proposed penalties and reductions were about the same across regions and at the different administrative and judicial review levels, and (3) if OSHA's policy of reducing penalties to avoid litigation achieved its goal of quicker and more comprehensive abatement of cited hazards. As agreed, we also obtained information on the early effects of the higher penalty limits that OSHA implemented on March 1, 1991.

To answer your questions we analyzed information from OSHA's automated data base of inspection results, interviewed national and field office personnel, and reviewed case files and records. We analyzed all inspections of private-sector establishments in which (1) OSHA issued citations in fiscal year 1989 and (2) the actual penalty amount was set and recorded by November 1990. Because our review focused on the typical citation, we eliminated citations with extraordinary penalties set under OSHA's "egregious" policy;¹ we also excluded citations issued for failure to correct previous violations. Our review included 169,793 violations resulting from

¹Since 1986 OSHA has cited certain employers who violate OSHA standards for every instance of a standard violation rather than assessing one penalty for a certain type of violation. This technique can result in multimillion dollar penalties, but only has been used by OSHA for about 130 inspections out of the thousands of inspections it conducts each year.

39,627 inspections. See appendix I for further details on the objectives, scope, and methodology of our review.

Results in Brief

OSHA and the Occupational Safety and Health Review Commission (OSHRC) have considerable discretion in proposing and subsequently reducing penalties. In determining the appropriateness of the penalties, OSHA's and OSHRC's policies require that they consider four factors specified in the law. The policies do not require that they consider the extent to which employers' have benefited economically from failing to comply with safety and health regulations.

The penalties OSHA initially proposed for violations cited in fiscal year 1989 usually were substantially below the maximum allowed by law, and many were reduced. This pattern was the same across all OSHA regions. Although few employers (6 percent) sought formal review of OSHA citations by contesting the citation or proposed penalty, penalty reductions for those who did contest were much higher than for those who accepted their citations. Penalty reductions for those who contested were somewhat greater than for employers who settled through OSHA's informal settlement process.

We were unable to determine whether penalty reductions achieve OSHA's goal of quicker and more comprehensive abatement of cited hazards, in part because the data needed for such an analysis were not available. Penalty reductions may lead to a quicker resolution of citations, but we could not establish a causal link between reductions and more comprehensive abatement.

Since the Congress authorized a sevenfold increase in maximum penalties, OSHA has been proposing penalties that are three to four times greater than they were before the new maximums went into effect. The increase in proposed penalties reflects both the legislated increase in maximum penalties and the administrative discretion that the agency is allowed for assessing penalties below the statutory maximums. There have been no changes to the factors that must be considered in assessing penalties.

Background

The Occupational Safety and Health Act of 1970 (29 U.S.C. 651) authorizes civil penalties for violations of OSHA standards. The act provides that OSHA may issue proposed penalties, using the penalty-setting criteria established by the Congress.²

Maximum civil penalty amounts for violating safety and health standards were established in the 1970 act, and the Congress increased the maximum amounts in the Omnibus Budget Reconciliation Act of 1990. In considering making this change, members of Congress cited the need for higher penalties, which it believed would constitute a more effective deterrent. Maximum penalty amounts for serious and other-than-serious violations increased from \$1,000 to \$7,000, and the maximums for willful and repeat violations increased from \$10,000 to \$70,000. A \$5,000 minimum penalty was established for willful violations. OSHA began applying these new penalties in March, 1991. Our study primarily analyzes citations issued before March, 1991.

In addition to setting maximum penalty amounts, the 1970 act set out four factors to be considered in determining what a penalty should be. These factors are: (1) the size of the business,³ (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's history of previous violations. The act provides no further guidance on how to apply the four factors.

Penalty Review

There are several layers of review for OSHA citations and proposed penalties. Once the citation and proposed penalty are received, within 15 working days the employer either (1) accepts the citation, abates the hazards and pays the penalties; (2) has an informal conference with local OSHA officials and negotiates an informal settlement agreement; or (3) formally contests before OSHRC.⁴

²Section 17(j) of the 1970 act provides that OSHRC has the final authority to assess civil penalties. In *Brennan v. OSHRC and Interstate Glass Co.* (487 F.2d 438 [8th Cir., 1973]), the court held that penalties proposed by OSHA, which are contested by the employer, are merely advisory.

³OSHA applies this factor by reducing the penalty for employers with fewer employees.

⁴OSHRC is an independent agency entirely separate from OSHA and Labor. Its function is to resolve formal contests of OSHA citations and penalties. OSHRC is headed by three Commissioners, who are appointed by the President, and has 19 administrative law judge positions.

If employers disagree with an OSHA citation, and the 15-day period for filing a formal contest has not expired, it is OSHA's practice to offer employers the opportunity to resolve their differences through an informal conference. This is a meeting between the employer⁵ and the OSHA Area Office Director and at least one other OSHA employee.⁶ They discuss such matters as the type of violation, the amount of the penalty, the abatement actions to be taken, and the date by which abatement must occur. The informal conference is a negotiation where many factors are considered in reaching an agreement acceptable to both the employer and OSHA.

OSHA's Field Operations Manual sets out rules and procedures for conducting informal conferences and limits the approval of penalty reductions at the field office level to no more than 60 percent of all proposed penalties. Higher penalty reductions have to be approved by the OSHA Regional Administrator in conjunction with the Regional Solicitor. OSHA strongly encourages employers to ask for these conferences to resolve disputed citations and penalties without resorting to litigation, which can be time consuming and expensive. If a settlement is reached, an informal settlement agreement is signed between OSHA and the employer.

If an agreement is not reached at the informal conference, or where no informal conference has occurred, the employer can formally contest OSHA's citations and proposed penalties before OSHRC. When OSHRC receives the case, it is assigned to an administrative law judge. The Regional Solicitor of Labor represents OSHA before the OSHRC judge. The administrative law judge hears the contested case and, on the basis of evidence provided at the hearings, affirms, vacates, or modifies OSHA's citations and proposed penalties. The judge's decision may be appealed to OSHRC's commissioners. Attorneys from the Solicitor of Labor's national headquarters represent OSHA before the Commission members.

Agreement can be reached at two points after the employer contests but prior to a hearing before the commissioners. The Regional Solicitor and the employer may come to agreement and withdraw the case from OSHRC's commissioners or both parties may accept the administrative law judge's decision and not appeal to OSHRC. Labor solicitors try to reach a settlement

⁵Informal conferences also may be requested and attended by any affected employee or the employee's representative.

⁶OSHA encourages the Area Office Director to include the inspector who conducted the inspection or the inspector's supervisor in the informal conference, but this is not required.

as soon as possible because employers are not required to start abatement actions on contested citations until all contested items are settled.

A decision by the commissioners may be further appealed to the U.S. Court of Appeals. As stated above, OSHRC has the final authority for assessing civil penalties. The U.S. courts will defer to the judgment of OSHRC on penalty amounts, unless there is an abuse of discretion by the Commission in setting the penalties.

Principal Findings

OSHA And OSHRC Have Considerable Discretion in Proposing and Reducing Penalties

OSHA has considerable discretion in determining the proposed penalty and negotiating reductions to it. The law requires that OSHA consider four specific factors in establishing penalties, but it does not specify how much weight those factors should have in agency deliberations.

The procedures OSHA has established for considering the four factors result in proposed penalty amounts that can be substantially below the maximums. OSHA uses gravity as the primary factor in deriving the proposed penalty. OSHA first calculates a gravity-based penalty, which can range from zero up to the statutory limit. OSHA then reduces the gravity-based penalty by specific percents for each of the other three factors. Before the maximum penalty was raised, the total reduction could be up to 80 percent of the gravity-based amount.

OSHA procedures also require that these factors be considered in further negotiations with employers who disagree with the proposed penalty. However, in those discussions, there is no formula tying reductions to specific factors.

OSHRC officials and judges told us that they determine penalties and reductions based on the four factors and maximum amounts set by law, as well as case law and the facts of each case. They do not use a structured formula for assessing penalties. Judges and commissioners determine penalty amounts case by case, based upon their professional judgment.

OSHA Does Not Consider Economic Benefit From Noncompliance in Setting Penalties

In proposing and reducing penalties, OSHA policies do not require consideration of another factor—employers' economic benefit from violating health and safety regulations. GAO has identified this as a useful factor for setting effective penalties.⁷ Economists assume that employers weigh the expected cost of noncompliance against the expected benefits from noncompliance when deciding whether to comply with OSHA standards. If employers think that any fines for violating safety and health regulations will be substantially less than the money saved by not correcting the safety or health hazard, then the economic incentive to continue to violate the regulations is strong.

In contrast with OSHA, Environmental Protection Agency (EPA) policy requires that penalty amounts be at least as great as the economic benefit that an employer receives from not complying with the law. According to EPA, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage, which creates a disincentive for compliance. EPA's policy is to remove the incentive to violate the law.⁸

To determine economic benefit, EPA officials collect specific information to which they apply a computer model available in all EPA regions. The information includes (1) delayed capital investment, (2) avoided operations and maintenance expenses, and (3) one-time nondepreciated expenditures. EPA's Office of Enforcement provides training on application of the computer model.

Average Penalties Were Well Below Allowable Maximums

OSHA rarely assessed the maximum penalty allowed before the act was amended. OSHA proposed the maximum amount for 2.1 percent of all violations with penalties, and it actually imposed the maximum for less than 1 percent of the violations. OSHA officials told us that the maximum penalty was rarely assessed because of the factors that the law requires OSHA to consider in determining penalties. However, even though larger firms are expected to pay penalties closer to the maximum, among the largest firms (more than 500 employees) only 14 percent received proposed penalties that were over 50 percent of the applicable maximum penalty.

⁷See, for example, *Environmental Enforcement: Penalties May Not Recover Economic Benefits Gained by Violators* (GAO/RCED-91-106, June 17, 1991).

⁸However, both GAO and EPA's Inspector General have criticized EPA for failure to fully implement this policy.

The average penalty OSHA proposed, whether considered per violation or per inspection, was substantially below the statutory maximum and was frequently reduced—in all regions.⁹ Considering all violations with penalties, the average proposed penalty was \$449, and the average actual penalty was \$270.¹⁰ Forty-one percent of the proposed per-violation penalties were reduced. The average reduction per violation was \$180; on average, penalties were reduced 32 percent.

Table 1 shows proposed and actual penalties, per violation, as a proportion of the maximum penalties allowed. For example, the average penalty proposed for a serious violation was 18 percent of the maximum allowed. After reductions, the average actual penalty was 7 percent of the possible maximum.

Table 1. Average Proposed and Actual Penalties as a Percentage of Pre-1991 Maximums^a

Figures are in percent		
Violation type	Proposed penalty	Actual penalty
Serious	18	7
Willful	85	27
Repeat	2	1
Other-than-serious	25	12
Overall	18	7

^aAverages are only for those violations with proposed penalties.

When penalties are viewed per inspection rather than per violation, the pattern in reductions remains the same. The 169,793 violations that we analyzed represented the results of 39,627 inspections for an overall average of 4 violations per inspection. About 73 percent of the inspections with violations actually resulted in proposed penalties. The average proposed penalty for these inspections was \$1,386, and the average actual penalty was \$828. About half the inspections had penalty reductions. The

⁹We found some variations that could not be explained by differences in firm size or industry type. These variations are described in appendix III.

¹⁰Forty-eight percent of the violations resulted in no penalty. Almost all of these were classified as other-than-serious violations. Almost all serious, willful, and repeat violations were assessed penalties initially.

average reduction was \$558; on average, penalties were reduced 26 percent.

When we analyzed the ratios of per-inspection penalties to the maximum amounts that could have been assessed, we found that the average proposed penalty was 26 percent of the maximum possible penalty amount and the average actual penalty was just 4 percent of the maximum amount.

Employers Who Contested Got Greatest Reductions

Most employers did not formally contest OSHA's citations, but those who did contest received the greatest penalty reductions. About 67 percent of the employers in our analysis accepted the citation and paid the proposed penalties. Another 27 percent had informal settlement conferences, and only 6 percent of employers formally contested. Employers who formally contested had penalty reductions of about 57 percent versus 45 percent for employers who did not contest.

Table 2: Average Penalties and Reductions per Inspection by Disposition Level

	No informal settlement ^a	Informal settlement	Formal (contested) settlement
Average proposed penalty	\$440	\$1,832	\$3,478
Average actual penalty	364	1,000	1,421
Average percent reduction	9	45	57
Percent of inspections	67	27	6

^aThe reductions in this category are due mainly to corrections and other changes to citations that did not warrant an informal settlement conference.

Even though they got the greatest reductions, employers who formally contested usually paid more than those who did not contest because their average proposed penalties per inspection were from two to eight times greater than those of other employers.

Difficulty Determining Relationship Between Penalty Reductions and Abatement

OSHA officials believe reducing penalties leads to both quicker and more comprehensive abatement. They told us that reducing penalties makes employers more likely to accept the penalty rather than contest it or to continue the appeal if they have already contested it. Given that employers are not required to abate contested violations until the citation is finally resolved, a delay in such resolution also delays the requirement to abate hazards (quicker abatement). Also, in return for reduced penalties,

employers may agree to correct problems in addition to those directly addressed in the citation. For example, they may agree to correct the problem at other worksites not yet inspected as well as the one where the problem was found (more comprehensive abatement).

We were unable to confirm a causal relationship between penalty reductions and quicker or more comprehensive abatement. However, we agree with OSHA that reducing the penalty could make an employer more willing to accept the citation, and the sooner a citation is resolved, the sooner abatement is required. Regarding more comprehensive abatement, OSHA does not track in its inspection data base what additional items were agreed to during informal or formal negotiations. Thus, we could not examine the relationship between reductions and additional agreements reached with the employer. In addition, in previous work we have noted—and OSHA has agreed—that OSHA's administrative procedures limit its ability to confirm when, if at all, employers actually abated those hazards specifically cited at a worksite.¹¹

Although Maximum Penalties Have Increased, Penalties Remain Substantially Below the Maximum

Although the maximum penalty has increased sevenfold, the average proposed penalty for an OSHA violation is about three times higher than it was before the new maximum penalties went into effect. Proposed penalties for the last half of fiscal year 1991 for serious and willful violations were three times higher than for the same period in the previous year. The average proposed penalties for repeat and other-than-serious violations were 4 and 10 times higher, respectively.

Average penalties may continue to be well below the maximums because OSHA and OSHRC policies and procedures for assessing penalties are generally the same under the new penalty maximums as they were in the past. For example, the four factors that must be considered in assessing penalties remain the same under the revised statute, and OSHA still considers gravity the primary factor for determining a proposed penalty. One change is that OSHA's revised administrative procedures allow the proposed gravity-based penalty to be further reduced up to 95 percent, rather than 80 percent, below the maximum. Also, the law now requires a

¹¹See Occupational Safety and Health: OSHA Policy Changes Needed to Confirm That Employers Abate Serious Hazards (GAO/HRD-91-35, May 8, 1991). We made two recommendations that we believe would give OSHA better evidence about whether employers have corrected hazards found during an inspection. OSHA has not yet implemented these recommendations, but is taking steps to do so.

minimum proposed penalty for willful violations, but does not require a minimum proposed penalty for serious or repeat violations.

Matters for Consideration by the Congress

By increasing the maximum penalties, the Congress hoped to deter employers from violating safety and health standards and to increase their compliance. As GAO has previously noted, basing penalties on employers' economic benefit from not complying would help strengthen this desired deterrent effect. Thus, because the Congress set forth the four factors to be considered in determining penalties, it may wish to consider amending the act to require that the benefit to the employer from noncompliance also be a factor used in setting penalties.

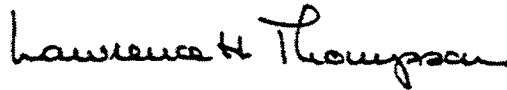
Agency Comments

OSHA described our study as thorough, objective, and methodologically sound. The agency agreed that its program must include strong incentives for all employers, whether inspected or not, to comply with the law. It noted that (1) while for methodological reasons we excluded the high penalties set under its egregious policy, that policy is a significant component of OSHA's enforcement strategy, and (2) penalties in 1991 increased considerably over the previous year. OSHA also stated that it did not believe public policy would be best served by an "across-the-board" application of penalties at their maximum level, and we agree. We use maximum penalty amounts as a criterion to evaluate penalties and we are not suggesting that maximum penalties should be applied in all instances.

Regarding employers' economic benefit from noncompliance, OSHA did not take a position on whether that should be considered as a factor in setting penalties. However, the agency did express its belief that, to the extent that employers make decisions on the basis of economic considerations as well as legal and moral ones, the threat of a very high penalty for flagrant violations is a real concern to them. (OSHA's comment letter is reproduced as app. IV.)

OSHRC did not provide written comments. However, we discussed the report with OSHRC officials and incorporated their comments as appropriate.

We are sending copies of this report to the Secretary of Labor, the Chairman of OSHRC, and other interested parties. Copies also will be made available to others on request. This report was prepared under the direction of Linda G. Morra, Director for Education and Employment Issues, who may be reached at (202) 512-7014 if you or your staff have any questions about this report. Other major contributors to this report are listed in appendix V.

A handwritten signature in black ink that reads "Lawrence H. Thompson". The signature is written in a cursive style with a large, stylized "L" and "T".

Lawrence H. Thompson
Assistant Comptroller General

Contents

Letter	1
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Appendix I Objectives, Scope, and Methodology	14
---	----

Appendix II Profile of Penalties for OSHA Violations	19
--	----

Appendix III Profile of Penalties in OSHA Inspections	22
---	----

Appendix IV Comments From the Department of Labor	28
---	----

Appendix V Major Contributors to This Report	30
--	----

Related GAO Products	32
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Tables	
Table 1. Average Proposed and Actual Penalties as a Percentage of Pre-1991 Maximums	7
Table 2: Average Penalties and Reductions per Inspection by Disposition Level Formal	8
Table II.1: Average Penalty per Violation	21
Table II.2: Average Penalty per Violation as a Proportion of Maximum Allowable Penalty (Violations With Penalties Only)	21
Table III.1: Distribution of Inspections as a Percent of Maximum Penalties Allowable	22

Table III.2: Distribution of Inspections as a Percent of Maximum Penalties Allowable, for Companies With 1 to 19 Employees	23
Table III.3: Distribution of Inspections as a Percent of Maximum Penalties Allowable for Companies With 20 to 99 Employees	24
Table III.4: Distribution of Inspections as a Percent of Maximum Penalties Allowable for Companies With 100 to 499 Employees	24
Table III.5: Distribution of Inspections as a Percent of Maximum Penalties Allowable for Companies With 500 or More Employees	25
Table III.6: Average Penalty by Region, Adjusted for Firm Size and Industry Type	26

Figures

Figure I.1: Distribution of Violations and Inspections Among Regions	15
Figure II.1: Distribution of Violations Cited in Fiscal Year 1989	19
Figure II.2: Proportion of Other-Than-Serious Violations by Region	20
Figure III.1: Average Proposed and Actual Penalty per Inspection by Settlement Level, by Region	27

Abbreviations

GAO	General Accounting Office
EPA	Environmental Protection Agency
IMIS	Integrated Management Information System
OSHA	Occupational Safety and Health Administration
OSHRC	Occupational Safety and Health Review Commission

Objectives, Scope, and Methodology

At the request of both the Chairman and the Ranking Minority Member of the Subcommittee on Health and Safety, House Committee on Education and Labor, we conducted a review of the Occupational Safety and Health Administration and issued a report describing options for improving safety and health conditions in the workplace in August 1990.¹ In the report we noted two problems with OSHA's enforcement efforts. First, because of limited resources, OSHA inspects most employers rarely, if at all. Second, sanctions for noncompliance with OSHA standards are weak.

Our objective in this review was to expand our analysis of the second problem. We were asked to consider the way OSHA sets and reduces penalties in order to identify any problems with its approach. Specifically, we attempted to establish (1) how much OSHA actually assesses for violations, (2) whether proposed and actual penalties were about the same across regions and at different levels of administrative and judicial review, and (3) whether penalty reductions achieved OSHA's goal of quicker and better abatement of cited hazards.

After we began this study, the Congress enacted a sevenfold increase in the maximum limits for OSHA's penalties that became effective for inspections conducted after March 1, 1991. As agreed, we obtained information about the early effects of the new limits on the penalties that are actually assessed.

We analyzed data maintained by OSHA in its automated Integrated Management Information System (IMIS). IMIS includes all inspection data gathered by OSHA, including data from state-plan states,² since the agency began inspections in 1971. We reviewed inspections

- conducted only by federal OSHA,
- of private sector establishments,
- where OSHA cited at least one violation,

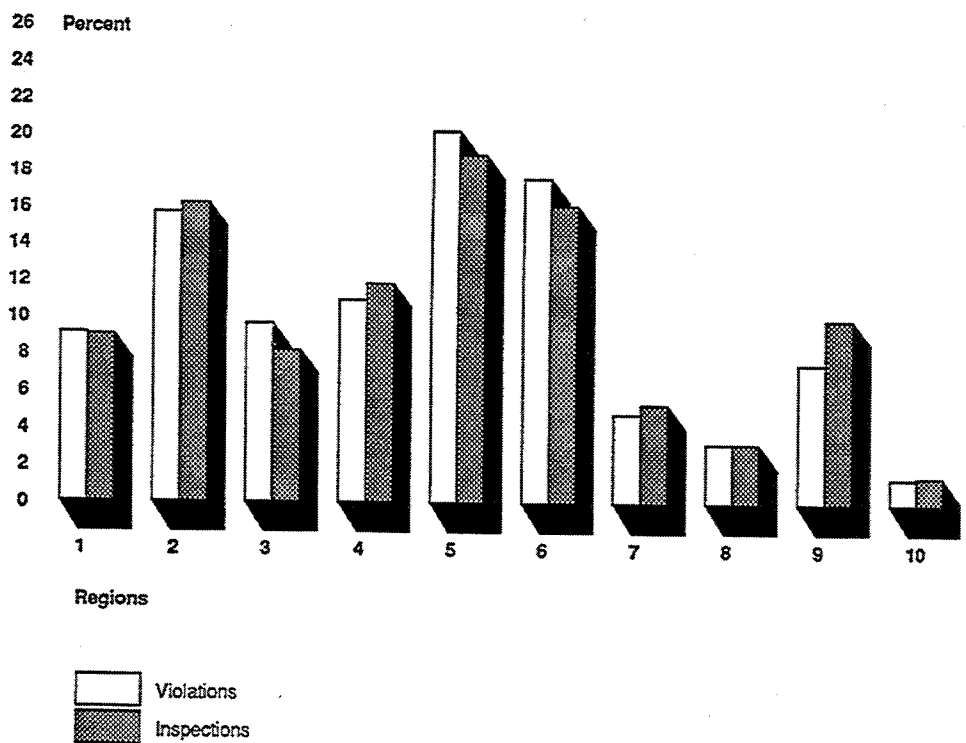
¹Occupational Safety and Health: Options for Improving Safety and Health in the Workplace (GAO/HRD-90-66BR, Aug. 24, 1990).

²The 1970 act authorizes the states to develop and operate their own safety and health programs. OSHA approves, monitors, and evaluates these state programs. It may fund up to 50 percent of the cost of operating these programs.

- with violations cited in fiscal year 1989 and with actual penalties set by the end of fiscal year 1990,³ and
- that were not treated as “egregious” cases by OSHA or the Department of Labor Solicitor.⁴

We also analyzed data about violations that were labeled serious, willful, repeat, and other-than-serious. We excluded failure-to-abate notifications because we wanted to track actual health and safety standards violations. Our review encompassed 169,793 violations resulting from 39,627 inspections conducted in fiscal year 1989. Figure I.1 shows how these violations and inspections were distributed among OSHA’s 10 regions.

Figure I.1: Distribution of Violations and Inspections Among Regions



³We considered analyzing inspection data from just one fiscal year. However, looking only at inspections that were initiated and closed in a given fiscal year would have excluded a large proportion of cases where the employer sought review of OSHA’s proposed penalties.

⁴Egregious cases are special cases where OSHA has determined that each instance of a violation should be cited separately instead of being grouped together as one item. Since 1986 there have been about 130 egregious cases. Because these cases are atypical and because including them in our analysis would have greatly inflated the overall penalty averages, we excluded them.

Methodology

Along with the analysis of OSHA inspection data, we performed case studies of six OSHA inspections in one field office. We chose inspections in only one office because we were interested in how reductions are made at different review levels and did not want to introduce differences in area office policies into the analysis. We selected the Cleveland Area Office for the case studies because it was located in OSHA's largest region, and because it appeared to have the best mix of inspections resolved at all settlement levels. We also interviewed agency officials from OSHA, the Solicitor of Labor, and Occupational Safety and Health Review Commission about penalty assessments and reductions and reviewed related policy documents.

For our case studies, we selected six cases from OSHA's Cleveland area office that were resolved at three different settlement levels. To determine why penalties were reduced in these cases, we reviewed OSHA's case files and interviewed the Cleveland Area Office director, inspectors, and supervisors. We also talked with regional and national office solicitors about formally contested cases and reviewed OSHRC case files for cases that were heard by OSHRC administrative law judges. We discussed the OSHRC cases with OSHRC's Chief Counsel.

In addition to performing case studies and data analysis, we reviewed (1) OSHA's internal field audit reports for fiscal years 1988 and 1989 and (2) national and field office instructions on setting and reducing penalties under both the old and new penalty systems.

We also reviewed OSHA's data on its experience with the new penalty system for the period March 1, 1991 to August 23, 1991.

Data Analysis

We analyzed the data provided by OSHA on both a per-inspection and per-violation basis to give a more complete description of penalties. We were interested in knowing how high penalties were both for different types of violations and for different employers.

In addition to analyzing actual dollar averages, we used the ratios of actual penalties to maximum allowed penalties for parts of our analysis as a way of expressing their relative values. We calculated the ratios individually for

each violation, taking into account that there are different limits for different categories of violations.⁵ We calculated individual per-inspection ratios in the same manner, except that penalties for all violations in a given inspection were added together to get a single ratio for each inspection. Ratio averages were derived from these individual ratios.

The averages that we report for penalty reductions were calculated by summing all individual reductions and then dividing by the number of cases. We did this for both individual violations and individual inspections.

Analysis of Regional Variations

We used multiple regression analysis to analyze regional variation in penalty amounts. We used separate statistical models to analyze the proposed and actual penalties. In these models, the dependent variable was the natural logarithm of the penalty amount. We used the logarithmic transformation in order to make the skewed distribution of penalty amounts close to a normal distribution, which is an important assumption for statistical inference in regression analysis.

In addition to region, our model included firm size and industry type as independent variables.⁶ By including these variables in the regression models, we were able to develop "adjusted" average penalty amounts that control for the effects of firm size and industry type on regional variation. These adjusted averages were obtained from the regression results by calculating the predicted averages for each region, standardized to represent the national mix of firm sizes and industry types. An important limitation of our results is that we were not able to control for the severity of violations, which could vary among regions and explain some of the variations in average penalty amounts. The results of our analysis are presented in appendix III.

⁵Maximum penalties prior to March 1991 were \$10,000 for willful and repeat violations, and \$1,000 for serious and other-than-serious violations. OSHA set a limit for other-than-serious penalties of \$300. In our analysis we used the administrative maximum of \$300 for other-than-serious violations rather than the \$1,000 statutory maximum since it is almost never assessed for other-than serious violations.

⁶For company size we used the following four categories of numbers of employees: 1-19, 20-99, 100-499, and 500 or more. For industry type we used the following six groups: agriculture, mining/construction, manufacturing, transportation, wholesale/retail trade, and finance/services.

Deleted Violations

OSHA does not include penalties for deleted violations when it calculates average penalties. However, we included all violations that were deleted in our analysis. Some of these violations were deleted because there was an error on the part of OSHA. However, others were deleted as part of settlement agreements with employers. We had no way of measuring how many violations were in either category. We included these violations in our analysis because deleted violations were a part of the original citation that the employer had to get resolved.

IMIS Coding Errors

While sorting inspections by different administrative and judicial review levels, we found that the settlement levels for a sample of cases at the Cleveland Area Office were incorrectly recorded in the IMIS. We reported this to OSHA and found that the problem was in the area office's interpretation of how to code the formal settlement level. OSHA reported that the problem had been noted in other locations and that correcting the errors in the data would require considerable time. Because of these errors, we were limited to sorting inspections by whether a case had been formally contested or resolved between OSHA and the employer through an informal agreement or by the employer not requesting any review.

We conducted our work between October 1990 and August 1991 in accordance with generally accepted government auditing standards.

Profile of Penalties for OSHA Violations

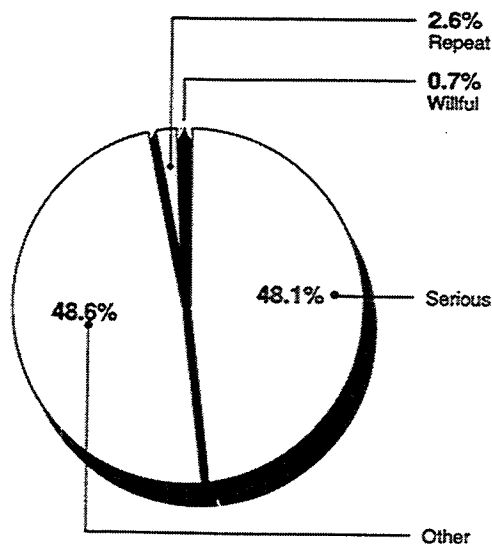
Violations fall into four categories:

- A serious violation occurs when there is substantial probability that death or serious physical harm could result from a hazard and the employer did know, or with reasonable diligence should have known, of the presence of the violation.
- An other-than-serious violation occurs in situations where the hazard would probably not cause death or serious physical harm but would have a direct and immediate relationship to employees' safety and health.
- A willful violation exists when the evidence shows either an intentional violation of the 1970 act or indifference to its requirements.
- A repeat violation occurs when a substantially similar condition is found within 3 years of the original citation final order date or from the final abatement date, whichever is later.

Our review covered 169,793 violations of which 88,789 violations had proposed penalties. Almost all of the violations that did not receive penalties were other-than-serious violations. Figure II.1 shows how violations were distributed among the four violation types for all violations, and for violations that had proposed penalties.

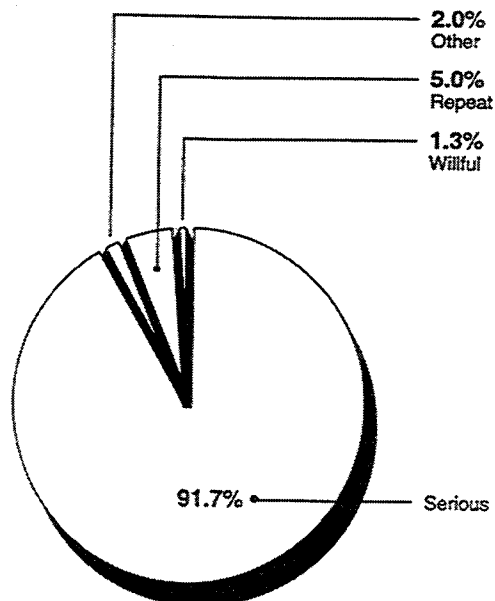
Figure II.1: Distribution of Violations Cited in Fiscal Year 1989

Total Violations



Total violations = 169,793

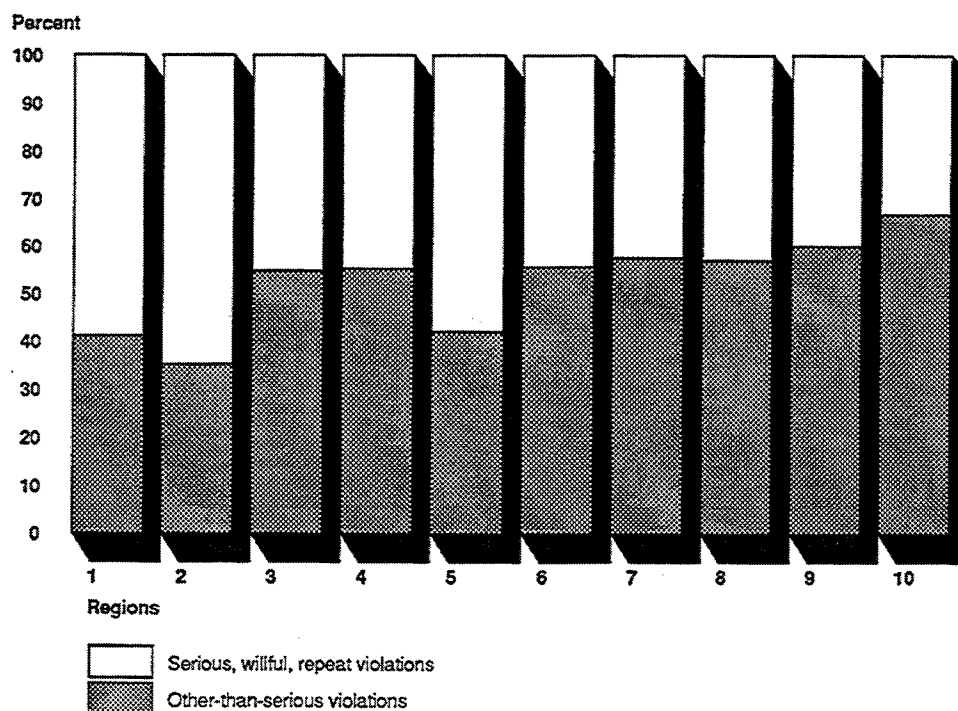
Violations with Penalties



Total violations with penalties = 88,789

Regions 1, 2, and 5 have the highest proportion of violations with penalties. They also have the lowest proportion of other-than-serious violations, as shown in figure II.2.

Figure II.2: Proportion of Other-Than-Serious Violations by Region



The most reliable predictor of whether a violation will receive a penalty is the seriousness of the violation. Other-than-serious violations have average proposed penalties of \$2.65 and actual penalties of \$1.61 primarily because 98 percent are not assessed penalties. On the other hand, almost 100 percent of serious violations receive penalties. Table II.1 shows the average proposed and actual penalty per violation and the average dollar and percentage reduction.

Appendix II
Profile of Penalties for OSHA Violations

Table II.1: Average Penalty per Violation

Type of violation	Proposed penalty	Actual penalty	Dollar reduction ^a	Percent reduction ^a
All violations	\$234.99	\$141.13	\$93.86	32
Serious	335.74	220.46	115.28	31 ^b
Willful	7,470.99	3,077.65	4,393.34	57
Repeat	874.13	535.37	338.75	33
Other	2.65	1.61	1.03	33 ^c
All violations with proposed penalties	\$449.38	\$269.72	\$179.66	32

^aReductions were calculated for each violation, then averaged.

^bWe eliminated 294 violations with no proposed penalty from this calculation.

^cWe eliminated the 80,704 violations with no proposed penalty from this calculation (leaving 1,861 violations).

Table II.2 shows the average penalty per violation as a proportion of the maximum penalty at the time of these inspections (fiscal year 1989).

Table II.2: Average Penalty per Violation as a Proportion of Maximum Allowable Penalty (Violations with Penalties Only)

	Proposed penalty ratio	Actual penalty ratio	Percent reduction
Serious	18	7	31
Willful	85	27	57
Repeat	2	1	33
Other-than- serious	25	12	33
Overall	18	7	32

For example, on average, willful violations had proposed penalties that were 85 percent of the maximum \$10,000 penalty but they were reduced an average of 57 percent to an average actual penalty of 27 percent of the maximum.

Profile of Penalties in OSHA Inspections

We analyzed 39,627 inspections with violations cited in fiscal year 1989. The average proposed penalty per inspection was \$1,000. Total inspection penalties were reduced an average of \$400 and the average actual penalty was \$600.

OSHA proposed penalties for 73 percent of inspections with violations. Fifty-one percent of the inspections with proposed penalties had penalty reductions. Seventeen percent of the inspections with penalty reductions had their penalties reduced to zero. Table III.1 shows the distribution of inspections by the ratio of proposed and actual penalties per inspection to the maximum possible per inspection given the violations that were cited. Well over half the inspections had penalties proposed that were less than 50 percent of the maximum they could have been assessed.

Table III.1: Distribution of Inspections as a Percent of Maximum Penalties Allowable

Percent of maximum penalty	Based on total proposed penalties		Based on total actual penalties	
	No. of inspections	Percent	No. of inspections	Percent
101 + a	11	•	2	•
91-100	313	0.8	85	0.2
81-90	264	0.7	77	0.2
71-80	416	1.0	144	0.4
61-70	913	2.3	380	1.0
51-60	1,004	2.5	453	1.1
41-50	2,088	5.3	1,178	3.0
31-40	3,458	8.7	2,295	5.8
21-30	6,210	15.7	5,147	13.0
11-20	8,343	21.1	9,064	22.9
1-10	5,773	14.6	7,523	19.0
No penalty	10,834	27.3	13,279	33.5
Totals	39,627	100.0^b	39,627	100.0^b

^aInspections with penalties over 100 percent of the maximum had other-than-serious violations assessed over the \$300 OSHA administrative maximum. A few were assessed the \$1,000 statutory maximum.

^bTotal may not equal 100 percent due to rounding.

Because the size of a firm is supposed to be considered in calculating penalties, we compared penalties per inspection for different sized firms to see if there were any differences in penalties. We found that larger firms received slightly higher penalties but distributions did not vary significantly. Tables III.2, III.3, III.4, and III.5 show the distribution of inspections by the ratio of actual penalties per inspection to the maximum

possible per inspection for four different sizes of firms. The percentage of inspections receiving zero proposed penalties ranges from 29.6 percent for employers with no more than 19 employees to 25.2 percent for employers with 100 to 499 employees. The percentage of inspections receiving zero actual penalties ranged from 38 percent to 30.1 percent, respectively.

Table III.2: Distribution of Inspections as a Percent of Maximum Penalties Allowable, for Companies With 1 to 19 Employees

Percent of maximum penalty	Based on total proposed penalties		Based on total actual penalties	
	No. of inspections	Percent	No. of inspections	Percent
101 + a	3	.	.	.
91-100	72	0.6	18	0.2
81-90	63	0.5	16	0.1
71-80	70	0.6	22	0.2
61-70	184	1.5	76	0.6
51-60	153	1.3	59	0.5
41-50	291	2.4	158	1.3
31-40	557	4.7	353	3.0
21-30	1,546	12.9	1,037	8.7
11-20	2,864	24.0	2,611	21.9
1-10	2,606	21.8	3,058	25.6
No penalty	3,537	29.6	4,538	38.0
Totals	11,946	100.0^b	11,946	100.0^b

^aInspections with penalties over 100 percent of the maximum had other-than-serious violations assessed over the \$300 OSHA administrative maximum. A few were assessed the \$1,000 statutory maximum.

^bTotal may not equal 100 percent due to rounding.

Appendix III
Profile of Penalties in OSHA Inspections

Table III.3: Distribution of Inspections as a Percent of Maximum Penalties Allowable for Companies With 20 to 99 Employees

Percent of maximum penalty	Based on total proposed penalties		Based on total actual penalties	
	No. of inspections	Percent	No. of inspections	Percent
101 + a	3	•	•	•
91-100	90	0.6	26	0.2
81-90	77	0.5	24	0.2
71-80	109	0.7	32	0.2
61-70	290	1.9	117	0.8
51-60	310	2.1	129	0.9
41-50	712	4.7	404	2.7
31-40	1,279	8.5	793	5.3
21-30	2,494	16.5	1,976	13.1
11-20	3,475	23.0	3,822	25.3
1-10	2,208	14.6	2,965	19.6
No penalty	4,045	26.8	4,804	31.8
Totals	15,092	100.0^b	15,092	100.0^b

^aInspections with penalties over 100 percent of the maximum had other-than-serious violations assessed over the \$300 OSHA administrative maximum. A few were assessed the \$1,000 statutory maximum.

^bTotal may not equal 100 percent due to rounding.

Table III.4: Distribution of Inspections as a Percent of Maximum Penalties Allowable for Companies With 100 to 499 Employees

Percent of maximum penalty	Based on total proposed penalties		Based on total actual penalties	
	No. of inspections	Percent	No. of inspections	Percent
101 + a	2	•	2	•
91-100	65	0.9	20	0.3
81-90	67	0.9	18	0.2
71-80	123	1.7	42	0.6
61-70	241	3.3	93	1.3
51-60	310	4.2	146	2.0
41-50	625	8.5	363	5.0
31-40	951	13.0	652	8.9
21-30	1,261	17.2	1,264	17.2
11-20	1,211	16.5	1,558	21.2
1-10	629	8.6	966	13.2
No penalty	1,848	25.2	2,209	30.1
Totals	7,333	100.0^b	7,333	100.0^b

^aInspections with penalties over 100 percent of the maximum had other-than-serious violations assessed over the \$300 OSHA administrative maximum. A few were assessed the \$1,000 statutory maximum.

^bTotal may not equal 100 percent due to rounding.

Table III.5: Distribution of Inspections as a Percent of Maximum Penalties Allowable for Companies With 500 or More Employees

Percent of maximum penalty	Based on total proposed penalties		Based on total actual penalties	
	No. of inspections	Percent	No. of inspections	Percent
101 + a	3	0.1	•	•
91-100	86	1.6	21	0.4
81-90	57	1.1	19	0.4
71-80	114	2.2	48	0.9
61-70	198	3.8	94	1.8
51-60	231	4.4	119	2.3
41-50	460	8.8	253	4.8
31-40	671	12.8	497	9.5
21-30	909	17.3	870	16.6
11-20	793	15.1	1,073	20.4
1-10	330	6.3	534	10.2
No penalty	1,404	26.7	1,728	32.9
Totals	5,256	100.0^b	5,256	100.0^b

^aInspections with penalties over 100 percent of the maximum had other-than-serious violations assessed over the \$300 OSHA administrative maximum. A few were assessed the \$1,000 statutory maximum.

^bTotal may not equal 100 percent due to rounding.

Because close to one-third of all inspections with violations have no proposed penalties, we also calculated the average penalty-per-inspection ratios for only those inspections with penalties. Overall, the average inspection was assessed proposed penalties totaling 26 percent of the maximum possible and the average actual penalty was 4 percent of the maximum possible.

Minor Regional Variations Exist

After accounting for variations in firm size and industry type, there remained some small variations in penalty averages among regions. The range among regions was \$470 for average proposed penalties and \$362 for average final penalties. However, all the penalties are consistently and substantially below maximum allowable penalties. Specific variations by region are shown in table III.6.

Table III.6: Average Penalty by Region, Adjusted for Firm Size and Industry Type^a

Region	Proposed penalties		Actual Penalties	
	Number of inspections ^b	Average penalty ^c	Number of inspections ^d	Average penalty ^c
1	2,912	\$798	2,732	\$623
2	5,236	872	4,848	676
3	2,324	704	2,146	530
4	3,070	587	2,832	462
5	5,868	694	5,344	508
6	4,437	439	3,998	336
7	1,388	402	1,286	314
8	851	562	781	406
9	2,394	509	2,102	427
10	314	596	285	443

^aThe adjusted average penalties are computed from linear regression results, holding constant firm size and industry type.

^bOverall, 27 percent of all inspections with a violation had no penalty, but among regions this proportion ranged from 18 to 47 percent. Because regions with the lower mean penalties tended to have a larger proportion of violations with no penalties assessed, the differences shown here may be understated.

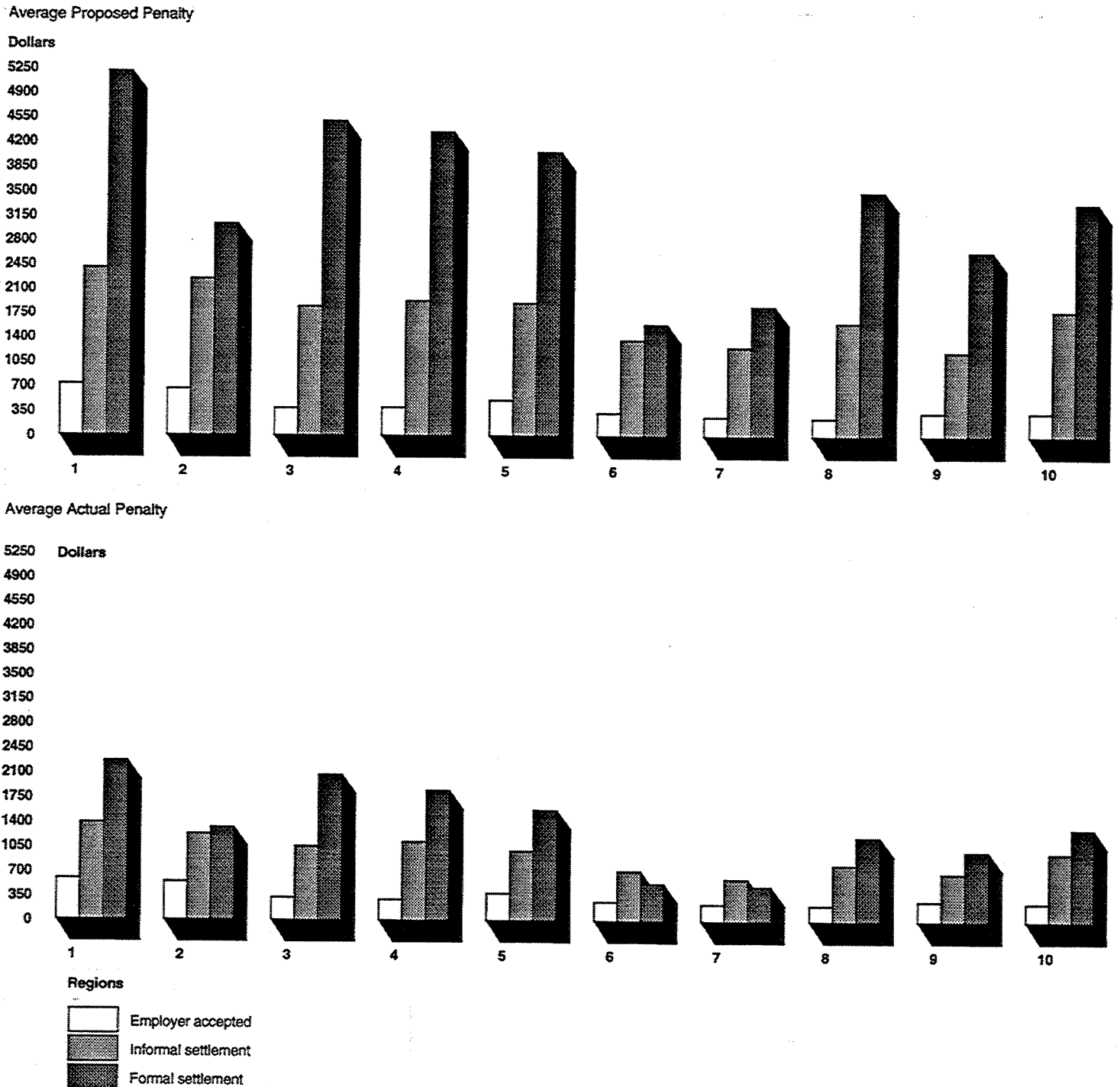
^cThese figures represent geometric rather than arithmetic means. We chose the geometric mean because it accounts for the nonsymmetric distribution of penalty amounts.

^dThe number of inspections with actual penalties is less than the number with proposed penalties because some proposed penalties are reduced to zero during the reduction process.

Highest Penalties Get Greatest Reductions

Those employers that receive higher penalties are more likely to either request an informal settlement or contest and get a formal settlement. In general, inspections with the highest penalties are contested. They also receive the greatest reductions but still pay the highest penalties, on average. Figure III.1 shows the average proposed and actual penalty per inspection by settlement level for each region.

Figure III.1: Average Proposed and Actual Penalty per Inspection by Settlement Level, by Region



Comments From the Department of Labor

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210



FEB 10 1992

Mr. Lawrence H. Thompson
Assistant Comptroller General
Human Resources Division
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Washington, D.C. 20548

Dear Mr. Thompson:

Thank you for your letter of January 9, addressed to Secretary of Labor Lynn Martin, transmitting for comment the General Accounting Office's (GAO's) proposed report entitled, "Occupational Safety and Health Administration: Penalties for Violations Are Well Below Maximum Allowable Penalties." The objective of the study was to review the way penalties for workplace safety and health violations are initially proposed and subsequently reduced.

GAO is to be commended for its thoroughness in conducting the study. We find GAO's review to be objective and the methodology to be sound. OSHA agrees that the success of its program must include strong incentives for all employers, whether inspected or not, to comply with the OSH Act.

OSHA's objective in promoting workplace safety and health is to encourage optimum compliance with its standards. Enforcement is just one of the many tools available to OSHA in meeting its mandate. The scope of the Agency's statutory mission is broad. Given the limited reach of OSHA inspections, the Agency uses all the tools granted under the OSH Act. These tools include on-site consultation, education and training. It has been OSHA's experience that programs which combine effective enforcement with educational and assistance efforts are the most successful.

While OSHA regards the use of civil penalties as a valuable enforcement tool, we do not believe that public policy would be best served by an "across-the-board" application of penalties at their maximum level. Using penalties in this fashion may prompt more litigation and, consequently, defer abatement of hazards. To optimize employer compliance, OSHA has decided to use discretion in the application of penalties. On page 12 of its report, GAO illustrates this point by stating, "... we agree that reducing the penalty could make an employer more willing to accept the citation and, the sooner a citation is resolved, the sooner abatement is required." The Agency believes that enforcement actions, with appropriate citations and penalties, should be measured by the degree to which employers fail to consider safety and health as an integral part of their

responsibilities. The Agency consequently believes that maximum penalties should be reserved for those few employers who demonstrate little or no concern for worker safety and health.

It should be emphasized that GAO in its case studies focused almost exclusively on penalty assessments before the Agency implemented new procedures on civil penalties in March 1991. These procedures, implemented as a result of the Omnibus Budget Reconciliation Act of 1990, not only modified the amounts of penalties but the methods of their calculation, including the way OSHA calculates penalty reductions. In Fiscal Year 1991, the first year reflecting the new maximum penalty policy, fines proposed by OSHA have increased 37.6 percent from the previous year. While it is too soon to evaluate fully the impact of these changes, it appears that OSHA's new penalty policy provides a significant deterrent.

On page 7 of the report, GAO states, "Economists assume that employers weigh the expected cost of noncompliance against the expected benefits from noncompliance when deciding whether to comply with OSHA standards." OSHA believes that most employers want to comply with the OSH Act for legal and moral reasons, not necessarily for economic considerations. To the extent employers make decisions on workplace safety and health based on economic considerations, the Agency believes that the threat of a very high penalty for flagrant violations of the OSH Act is a real concern to employers.

OSHA understands that for methodological reasons GAO excluded citations with extraordinary penalties set under the Agency's egregious policy. However, OSHA strongly believes that it is important to note the significance of its egregious policy as a major component of the Agency's enforcement strategy. Under the egregious policy, OSHA has systematically applied increasingly higher penalties across a wide variety of industrial groupings and has given wide publicity to these actions. OSHA's egregious policy has allowed the Agency to use the civil penalty process to emphasize the seriousness of safety and health violations and to multiply the deterrent effect of a single inspection. Since OSHA began its policy in 1986, almost two-thirds of the egregious cases have been settled prior to a hearing, thereby securing swift abatement of hazards.

OSHA appreciates the information provided in this report. The Agency welcomes the opportunity to have constructive dialogue on ways to improve workplace safety and health.

Sincerely,


Dorothy L. Strunk
Acting Assistant Secretary

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Related GAO Products

Occupational Safety and Health: Worksite Safety and Health Programs Show Promise (GAO/T-HRD-92-15, February 26, 1992).

Occupational Safety & Health: OSHA Action Needed to Improve Compliance With Hazard Communication Standard (GAO/HRD-92-8, Nov. 26, 1991).

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Managing Workplace Safety and Health in the Petrochemical Industry (GAO/T-HRD-92-1, Oct. 2, 1991).

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Informal Settlement of OSHA Citations: Comments on the Legal Basis and Other Selected Issues (GAO/HRD-85-11, October 26, 1984).

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